No. 11,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COFFIN REDINGTON COMPANY
(a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
HERBERT H. BENT,
Regional Litigation Attorney,
JACOB CHAITKIN,
Special Appellate Attorney,
1355 Market Street, San Francisco 3, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Miscellaneous

No. 11,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COFFIN REDINGTON COMPANY (a corporation), *Appellant,*
vs.
CHESTER BOWLES, Administrator, Office of Price Administration, *Appellee.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTION.

Appellee adopts the jurisdictional statement contained in the appellant's opening brief.

STATUTES AND REGULATIONS INVOLVED.

The action involves Maximum Price Regulation No. 445, as amended and revised (9 F.R. 4687), hereinafter called "the Regulation", which establishes maximum prices for distilled spirits and wines, and particularly Section 7.8(b) thereof entitled "Evasion", reading as follows:

"(b) Evasion. The provisions of this regulation shall not be evaded, whether by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt, of or relating to any commodity, or service covered by this regulation, alone or in conjunction with any other commodity or service or by way of finder's fees, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by *tying agreement, combination sales,* or trade understanding; by requiring the buyer to purchase packaged distilled spirits or wine on a per drink basis; or in any other way. The specific enumeration of acts constituting evasion is illustrative but not exclusive." (Emphasis supplied.)

STATEMENT OF THE CASE.

This action was instituted by the Price Administrator to enjoin the defendant from engaging in certain unlawful practices in connection with sales of whiskey at wholesale. The complaint alleged (1) that defendant sold distilled spirits at prices higher than permitted by the regulation, and (2) that defendant sold imported whiskey or domestic whiskey only on condition that the purchaser accept delivery of, and pay for, other beverages, such as domestic rum, gin, tequila and vodka (R. 3).

It was stipulated between the parties at the trial that although the total price charged for the whiskey plus the other commodities exceeded the maximum price permissible for the whiskey alone, none of the

individual commodities were sold at a price in excess of ceiling price for each such commodity (R. 26-27). Upon hearing the testimony of the liquor retailers who purchased the commodities from the defendant, the testimony of an investigator for the Office of Price Administration, and the testimony offered by the defendant, and after the submission of briefs by both sides the Court granted an injunction which prohibited the defendant from evading the regulation, directly or indirectly, by reason of tying agreements or combination sales of liquor and also from selling liquor at prices in excess of those permitted by the regulation (R. 19).

The principal questions presented by this appeal are (1) whether the evidence is sufficient to sustain the Court's finding "that the defendant has violated the regulation and specifically by tying agreements and combination sales prohibited in said Section 7.8(b)" (R. 13-14), (2) whether an affirmative finding of (1) above, where the total price charged by the seller exceeds the maximum legal price for the "wanted" commodity, justifies a finding that the defendant sold liquor at over ceiling prices, and (3) whether an affirmative finding by the lower Court of either (1) or (2) above justifies the granting of the injunction.

ARGUMENT.

I. THE EVIDENCE PRESENTED TO THE TRIAL COURT WAS SUFFICIENT TO SUSTAIN THE FINDING THAT THE DEFENDANT SOLD WHISKEY ONLY UPON THE CONDITION THAT THE PURCHASER ALSO BUY SOME OTHER COMMODITY.

Appellant does not argue that the selling of a commodity subject to the regulation only upon the condition that the purchaser buy, in addition, some other commodity, does not violate the provisions of Section 7.8(b) of the regulation, as well he cannot, inasmuch as the language of said section is clear and unambiguous. Furthermore, it has repeatedly been held by the Courts that such practices constitute an evasion not only of this particular regulation but also of other regulations which do not contain a specific provision prohibiting tying agreements or combination sales. *U. S. v. Kraus,* 149 F. (2d) 773 (C.C.A. 2d, 1945); *U. S. v. Armour and Co.,* 50 F. Supp. 347; *Bowles v. Cudahy Packing Co.,* 58 F. Supp. 748; *Brown v. Banana Distributors,* 52 F. Supp. 804; *Bowles v. Inland Trading Co.,* (N.D. Ind.) O.P.A. Desk Book, 2 Opinions and Decisions 2223; *Edelmann v. Bonded Liquors, Inc.,* O.P.A. Desk Book, 2 Opinions and Decisions 2211; *Bowles v. Stafford,* 56 F. Supp. 976; *Bowles v. Thiel,* (E.D. Wis., Jan. 8, 1946). The necessity compelling the Administrator to prohibit tying agreements in order to "stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices," and to eliminate "profiteering * * * resulting from abnormal market conditions or scarcities

* * *"[1] is well stated by the Court in *Edelmann v. Bonded Liquors, Inc., supra,* wherein the Court said:

> "In the case at hand the plaintiff, in order to obtain bourbon whiskey, was required to purchase another commodity (gin), whether or not he wanted such other commodity. Consequently, the amount which he paid for this commodity would, in effect, be paid in order to obtain a bottle of whiskey. The value of plaintiff's dollars thereby became less when, to buy one article, he had to buy something else in addition, with the result the inflationary spiral was started on its way. It takes little imagination to conceive what would happen if the defendant and others were permitted to circumvent the purposes and objectives of the Act in the manner described. Persons in control of scarce articles, like refrigerators, radios, stoves, and other essential household goods, could by reason of such practice unload quantities of plentiful and unwanted articles on the market, with the result the value of the purchasers' dollars would shrink and the cost of goods would rise. The fact that the charges made for the 'tied-in' commodity and the desired article were in the aggregate not in excess of the maximum prices for such articles would not in any sense lessen the inflationary tendencies of such practices, nor make such practices any less in conflict with the purposes Congress sought to achieve by enactment of the Emergency Price Control Act."

Appellant does argue, however, that the evidence below was insufficient to sustain the finding by the Court

[1]Section I, Emergency Price Control Act of 1942, as amended.

that defendant sold whiskey only upon the condition that the purchaser also buy other commodities. This contention is, we submit, without merit.

As was correctly stated by the Court in *Bowles v. Stafford, supra* (See Appendix, Appellant's Br.) "This type of case is difficult of proof by the Administrator." This is, of course, due to the natural reluctance of witnesses to testify adversely to the interest of their suppliers, who hold the threat of economic life or death over them under existing marketing conditions. The only manner in which plaintiff can show the existence of violations of this particular type is through the testimony of the purchasers and by circumstantial evidence. The purchasers are all liquor retailers. Due to the scarcity of liquor (mainly whiskey) during the periods here in question, the maintenance by liquor retailers of their businesses as going concerns depends entirely upon their ability to obtain, from wholesalers, the type of liquor which their customers demand. Whiskey is, of course, the most sought-after type of liquor (Appellant's Br. p. 18) and it is self-evident that if a retailer did not have at least some whiskey for sale he would soon lose his customers to others who did. As was brought out by defendant during the trial below (R. 82-84) it instituted a system of allocation of its liquors starting in 1942, under which system it only sold to its customers of long standing, the amount each such customer was allotted being determined on the basis of their previous purchases from defendant. Under this system the defendant closed its doors to new customers. Due to

the great scarcity of liquor during the period here involved there is ample reason to believe that the situation described above applies with equal force to other wholesalers in the San Franciseco area, and, as there is no law which requires a wholesaler to sell to any particular retailer, it follows that normally a liquor retailer, in order to remain in business, must maintain the good will of the wholesaler from whom he customarily purchased his commodities.

It is therefore necessary that the obvious reluctance of plaintiff's witnesses to testify against the defendant be borne in mind in analyzing the evidence presented to the trial Court so that the same may be correctly interpreted. Furthermore, it should be noted that although the witnesses who testified below and also the appellant in its brief approached the question of a "tying agreement" with the assumption that an actual "forcing" or "compelling" was necessary in order for plaintiff to make out his case, the word "force" when here used has a different connotation than that normally given it. As was stated by the Court in the case of *Bowles v. Inland Trading Company, supra:*

> "There were people who wanted to buy bananas and did not want to buy anything else, and yet were, for a want of a better term, perhaps coerced is too strong, but at least there was a 'must' proposition with these customers to either buy other vegetables or fruits that they did not want or did not need or did not want to buy from this defendant in order for them to buy bananas."

In the instant case there is no evidence that appellant's salesmen informed any liquor retailer, in so

many words, that "we will not sell you whiskey unless you also buy other commodities." Indeed, in view of the economic background given above such plain language was entirely unnecessary in order for said salesmen to accomplish their purpose. Furthermore, such a statement could hardly be expected of salesmen who well knew that "tying agreements" or combination sales" were illegal under a federal statute. A suggestion, by innuendo, was all that was needed to convey to the retailer the necessity of his buying rum or tequila if he expected to obtain whiskey.

Appellant has pointed out that each of the witnesses called by the government denied having been "forced" to purchase anything from the Company. In addition, appellant set forth in its brief, in narrative form, the gist of the testimony of said witnesses. The nicety with which appellant's salesmen applied "force by innuendo" does not therefore appear from its printed brief.

The testimony of Edith Gelsi is typical. The witness testified that she was the owner of a tavern which was managed by herself and her husband. The following conversation took place between said persons and one Mr. Guido, salesman for appellant Company (R. 49-50):

> "A. Mr. Guido walked in the door and he said, 'Good morning,' and I said, 'How are you?' And he said, 'Fine, thank you,' and he said, 'How is your husband,' and I said, 'Fine, he is in the back room,' so I called for my husband, so my husband comes in the room, into the tavern, and

my husband started talking to him, and he said, 'Have you any liquor today, any whiskey today?' And he says, 'Yes, but not much,' and my husband says, 'What have you got to sell?' And he said, 'We have got some anchovies.' My husband said, 'We don't need anchovies, we have no grocery store around here and this is a tavern,' and so my husband said, 'What else have you got besides anchovies?' And he says, 'Couldn't you use some anchavies?' And so my husband said, 'Where is my wife?' And he talked to me and he says, 'You can send me some.' And so my husband said, 'What else have you got?' So he opened up his show case, his suitcase, and he read out what he had down in his store, and so my husband asked him, 'Have you any whiskey?' And he said, 'We are very low on whiskey.' He said at that time it was very scarce, and so he went through the list from A to Z what he thought he could sell and what we could use at the present time, and we said he had a little of everything else on the shelf, and my husband said, 'How about some whiskey,' And he said, 'Well, I can sell you half a case.' ''

Several things are noteworthy regarding the above testimony. In the first place, notwithstanding the fact that the witness' husband had told the salesman that he could not use anchovies in his business, the salesman persisted in ''suggesting'' that the witness purchase anchovies. Secondly, no mention was made concerning the amount of anchovies to be purchased, nor the price to be paid therefor (this was no doubt provided for by the ''allotment system''). Furthermore,

the salesman refused to enter into any discussion regarding the sale of whiskey until Mrs. Gelsi had purchased other commodities.

The testimony of Mattie R. Parker is enlightening in regard whether this witness actually desired to purchase rum which was sold her by appellant. The witness was asked by counsel for Administrator (R. 30-31):

> "Q. There is an invoice of June 21 for half a case of Calvert Lord, ½ case Old Fitz, and a case of Marin Rum Gold. Did you want all of those?
>
> A. Well, I did not refuse any of them.
>
> Q. Did you order any of them?
>
> A. I did not order them, I took what was allocated to me.
>
> Q. Did you want the rum?
>
> A. I did not refuse any of it. Naturally, whiskey being the biggest seller, and they being out of whiskey, I did not refuse any of it.
>
> Q. Here is one of May 25, ½ case Calvert Reserve, ½ case Old Fitz, ½ case Nautical Rum, ½ case Hermosa Tequila.
>
> A. Yes.
>
> Q. Did you order those items?
>
> A. No, I took whatever I could get, whatever I was allocated.
>
> Q. Did you want each of them?
>
> A. Well, I wanted to get anything I could get, but, as I said before, I preferred to have whiskey."

In the same connection Mr. Ferroni, a restaurant operator who also sold liquor, was called by the Ad-

ministrator. The following testimony was given (R. 37-38):

> "Q. Didn't he tell you in June of last year that if you wanted to make a deal he would let you have 10 cases of Fitzgerald Whisky if you took 12 cases of Hermosa Tequila and 3 cases of Anis Gorilla?
>
> A. He didn't tell me that. I say I would like to have 10 cases of whisky, and we talked and talked, and he asked me if I wanted a dozen cases of Tequila, and 2 or 3 cases of the Anis Gorilla. * * * What he says, 'Do you want to take any Anis Gorilla, about two or three cases.' I say I will buy that, and when he talk about Tequila, I buy that. I will tell you, they don't force me to buy anything."

That these witnesses were hostile to the government (for the economic reasons previously stated) is beyond question. Mattie R. Parker, A. Ferroni, and Nat Lasser all admitted while testifying that they had previously given signed statements to Frank Richardson, an Office of Price Administration investigator, to the effect that they had purchased liquor items other than whiskey from the defendant in order to be able to obtain whiskey. Mr. Richardson himself testified that these statements were made freely and in unequivocal language (R. 62-67).

Although the regulation does not require that the one commodity be scarce, and the commodity which is "tied to it" be plentiful,[2] there was ample evidence be-

---

[2]Section 7.8(b) of the Regulation does not exempt from its scope either commodities which are scarce or those which are plentiful: on the contrary, it specifically states that the Regulation shall not be evaded by the sale of a "commodity * * * covered by this regulation, alone or in conjunction with *any other commodity.*" (Emphasis supplied.)

fore the trial Court that at the time the transactions here involved took place (June and July, 1944) the demand for liquors other than whiskey was practically non-existent, and that defendant's customers, instead of desiring to purchase more of such items, were growing panicky worrying over how they could get rid of their overloaded shelves. On June 22, 1944, Mr. H. J. Haaf, the defendant's vice-president in charge of sales, issued a bulletin (R. 115-118) to defendant's salesmen wherein said vice-president stated, under the heading of "Odd Items" (R. 116):

> "Many customers are already asking how they can dispose of Rum, Imported Gin, Tequila, Brandy, Vodka, etc., etc. 'Can I cut prices?' and numerous other questions are being asked. It appears that some of the trade are becoming panicky. Right here it should be borne in mind that where it is thought necessary everyone has about sixty days to reduce inventories. Furthermore, while the demand for these items will unquestionably drop, *it will not cease entirely.*"

Viewed in this context we submit that the evidence clearly shows these was at least a "must"[3] proposition advanced by defendant's salesmen, which was clearly understood, not only by the liquor retailers, but by the learned trial Judge. The rejection by the lower Court of the witnesses' statements that they were not "forced" to buy anything from the defendant was not only within the Court's province in view of the obvious conflict between such statements and the recitals by the witnesses of the actual conversations which took place between themselves and defendant's

[3]See *Bowles v. Inland Trading Company, supra.*

salesmen, but, in the light of all of the evidence submitted, was entirely reasonable.[4]

It is also noteworthy that although defendant during the trial made much of the fact that the retailers to whom it allocated its liquors had the right to return for credit any of said liquors which the retailers did not desire, none of said retailers actually returned any of the liquor sent them.[5] The reason is obvious. Moreover, although an inter-office bulletin issued by the said Mr. Haaf on August 4, 1944, indicates that a customer could return goods sent to him under the allocation system (R. 112), there is evidence that at the time of the sales here in question the contrary was the fact. Mr. Haaf's bulletin of June 22, 1944, specifically states that (R. 117) "Under the State Board of Equalization Ruling, which has been in effect for a number of years past, no goods are returnable for credit."

---

[4]Although there is no necessity here for appellee to treat the witnesses' admissions, made in Court while under oath (that they had previously stated that appellant forced them to purchase unwanted commodities) as substantive evidence in order to sustain the lower Court's decision, it is noteworthy that there is a growing tendency among the Courts so to do. See 3 Wigmore on Evidence, 3rd Ed., 1940, Sec. 1018, and cases there cited; 30 Cornell Law Quarterly 511, 514. As was stated by Judge Learned Hand in the case of *Di Carlo v. U. S.*, 6 F. (2d) 364 (1925), cert. den. 268 U. S. 706: "The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court." This language was quoted with approval by Judge Garrecht in the case of *Craig v. U. S.*, 81 F. (2d) 816 at p. 828.

[5]One case of rum was cancelled by Mr. Lasser (R. 98) prior to its being sent him.

II. THE SALE OF WHISKEY ONLY ON CONDITION THAT THE PURCHASER ALSO BUY SOME OTHER COMMODITY CONSTITUTES AN OVER THE CEILING SALE WHERE THE PRICE CHARGED FOR BOTH COMMODITIES EXCEEDS THE MAXIMUM PRICE FOR THE WHISKEY, AND THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE LOWER COURT'S FINDING THAT SUCH OVER-CEILING SALES TOOK PLACE.

As was previously pointed out, it was stipulated by counsel that the price charged the various liquor retailers by appellant for the whiskey plus other commodities exceeded the maximum price permissible under the regulation for the whiskey alone (R. 27). As was shown under Point I above, the appellant conditioned the sale of its whiskey upon the purchaser buying other commodities. This constitutes the selling of whiskey at a price in excess of its maximum legal price. The lower Court obviously concluded that the whiskey was the wanted commodity and that the retailers did not want or desire to purchase the rum, tequila, anchovies, etc., which were "allocated" to them (R. 12-14). This was in accord with the evidence. For example, Mattie Parker's only reply to repeated questions regarding whether or not she wanted the secondary items which she had not ordered was "Well, I did not refuse any of them" (R. 30-31). Edith Gelsi testified her husband pointedly told the salesman that "We don't need anchovies, we have no grocery store around here and this is a tavern" (R. 49).

It has often been held that where, as here, the question is one of intent, the trial judge who has heard the witnesses must sift the truth from the lies, and his findings based upon that portion of the testimony

which he accepts as true, must be treated as unassailable. This Court stated in *Wittmayer v. U. S.,* 118 F. (2d) 808, at 811:

> "As was said by Mr. Justice Holmes in *Adamson v. Gilliland,* 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L.Ed. 356 (citing *Davis v. Schwartz,* 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

As was recently pointed out by Judge Learned Hand in *U. S. v. Aluminum Co. of America,* 14 F. (2d) 416, at page 433: "The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds." Judge Hand concludes that "upon an issue like the witness' own intent, as to which he alone can testify, the finding is indeed unassailable, except in the most exceptional cases."

That the appellant received additional consideration, over and above the maximum price which he charged for the whiskey, from the sale of the "tied-in" commodities is apparent, as it received the benefit of disposing of commodities which were not in demand

by either the retailers or the public.[6] The ability to dispose of merchandise is itself a thing of value. It is to be noted that Section 302(b) of the Emergency Price Control Act (50 U.S.C. App., Supp. IV, 942(b)) defines price as "the consideration demanded or received in connection with the sale of a commodity."

Similarly, the purchasers in this case paid more than ceiling prices for the whiskey. In order to obtain this whiskey they had to purchase other liquors which they did not want. Whether or not they were later able to sell these other commodities is immaterial; at the moment of sale they were required to expend more than the ceiling price in order to obtain the scarce commodity. To illustrate, a retailer who has $100 with which to purchase a supply of whiskey which his customers want cannot buy said whiskey if, in addition, he is required to buy $100 worth of vodka, even though the vodka may be worth $100 and even though he may, at some later time, be able to dispose of said vodka. The necessity of making an undesired purchase is therefore in itself an additional burden to the purchaser and thus a consideration beyond the established price. We therefore submit that the appellant was guilty of violating the regulation in that he sold whiskey at a price in excess of the maximum price permissible.

---

[6]See Bulletin issued by Vice-President in Charge of Sales of defendant Company, dated June 22, 1944 (R. 116), previously quoted in this brief.

III. UNDER RULE 52(a), FEDERAL RULES OF CIVIL PROCEDURE, AS INTERPRETED BY A MAJORITY OF THE CIRCUIT COURTS OF APPEALS OF THE UNITED STATES, THE APPELLATE COURT WILL NOT WEIGH CONFLICTING EVIDENCE UPON WHICH THE COURT BELOW BASED ITS FINDINGS OF FACT IN A CASE TRIED WITHOUT A JURY, BUT WILL MERELY DETERMINE WHETHER THERE WAS "SUBSTANTIAL" EVIDENCE TO SUSTAIN SAID FINDINGS.

Appellant contends (Opening Br. pp. 22-23) that under Rule 52(a) of the Federal Rules of Civil Procedure this Court will set aside the findings of fact of the trial Court if said findings are against the clear weight of the evidence. Although appellee has amply shown that the findings of the lower Court are not against the clear weight of the evidence, nevertheless the Administrator desires to point out that appellant has inaccurately stated the rule. Appellant, in support of its contention, has cited the following cases:

State Farm Mutual Automobile Insurance Company v. Bonnacci, 111 F. (2d) 412 (C.C.A. 8th);

Schultz v. Manufacturers and Traders Trust Company, 128 F. (2d) 889 at 900 (C.C.A. 2nd);

Aetna Life Insurance Co. v. Kepler, 116 F. (2d) 1 (C.C.A. 8th);

Fleming v. Palmer, 123 F. (2d) 749 (C.C.A. 1st).

The first two cited cases by appellant are not in point. In the *State Farm* case the findings are based upon evidence given not in the presence of the lower Court but during the trial of another action in a state Court. The Circuit Court of Appeals held that since

the District Court had no better "opportunity of judging the creditability of the witnesses than did it, the scope of review was enlarged to include the weighing of conflicting evidence by said Appellate Court.[7]

The language of Judge Frank in the *Schultz* case, *supra,* cited by appellant, is merely another statement of the same rule.

The First and Eighth Circuits apparently follow the rule as stated by appellant. However, an analysis of the decisions of the other circuits discloses that the First and Eighth Circuits do not represent the majority view on this subject, nor do they accord with the practice of this Court.

Rule 52(a) of the Federal Rules of Civil Procedure provides that the findings of fact made by a trial Court without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witness". Prior to the enactment of the rules it was generally stated that in actions at law review of the facts was limited to the inquiry as to whether they were supported by any substantial evidence, while in an equity appeal the entire record was open to the Appellate Court to re-examine all the facts, and the findings could be reversed if it was against the clear weight of the evidence. With the abolition of the distinction between law and equity,

[7]This is, of course, in accordance with the rule well established in this and other circuits. Indeed, this Court has held in *Equitable Life Insurance Company v. Irelan,* 123 F. (2d) 462, that when the evidence below is given by deposition, the reviewing Court gives only "slight weight" to the findings of the trial judge.

the advisory committee was faced with the choice of the type of review to be adopted for the trial of cases by a Court without a jury. The committee was in disagreement on this subject, Dean Clark advocating the adoption of the law type of review, and a majority of the committee favoring extension of the equity review to all issues tried by the Court.[8] Accordingly, the draft first submitted to the Supreme Court adopted the equity formula: "The findings of the Court in such cases shall have the same effect as that heretofore given to findings in suits of equity." However, in the second proposed draft[9] this language was changed to that which presently appears in Rule 52. It is also significant that the final committee note states, not that Rule 52 adopts, but merely that it is *"in accord"* with the modern federal equity practice.

In view of this background it was contended by legal writers immediately after the rules were promulgated that the scope of review called for by Rule 52(a) did not necessarily follow the equity type review.[10]

The trend of decisions since 1939 sustains this view. While it is frequently stated that Rule 52(a) merely formulates the old equity method of review, the Circuit Courts of Appeals in most of the circuits have actually adopted a type of review which is much closer to the law type. Except in the First and Eighth

---

[8]Clark and Stone, Review of findings of fact, 4 U. Chi. L. Rev. 190, 191-192; Note to the Supreme Court following proposed Rule 68, preliminary draft (1936).

[9]Proposed Rule 59, Report of the Advisory Committee, 1937.

[10]Federal Appellate Practice as Affected by the New Rules of Civil Procedure, Werner Ilsen and Robert E. Hone in 24 Minn. L. Rev. 1, 2 F.R.S. 736.

Circuits, the test applied by the Courts is merely whether substantial evidence appears in the record to sustain the findings of the Court, and no review of the evidence is undertaken for the purpose of determining where the preponderance lies. This is particularly true of cases in which, as in the case at bar, the ultimate question to be decided is that of the intent of witnesses and the most important factor in the case is the credibility of their testimony.

In the Tenth Circuit,[11] Seventh Circuit,[12] Sixth Circuit,[13] Fifth Circuit,[14] and Second Circuit[15] the Courts have applied the substantial evidence rule. In *Webb v. Frisch,* 111 F. (2d) 887, 888 (1940) the Court stated:

> "Our function is to review the finding of the lower court and not to pass upon the evidence *de novo.* We cannot say that a finding of the fact of prior use is 'clearly erroneous' merely because we might have entertained some doubt about the quantum of evidence. We must attach to the testimony of witnesses the full weight and quality of credibility which the trial court gave it."

In *Andrew Jergens v. Conner,* 125 F. (2d) 686 (C.C.A. 6th) the Court stated that the lower Court's findings of fact are conclusive on appeal "no matter

---

[11]*U. S. v. Prosch,* 137 F. (2d) 92 (1943); *Continental Oil Company v. Bowles,* 113 F. (2d) 557, 564 (1940).

[12]*Webb v. Frisch,* 111 F. (2d) 887, 888 (1940); *Gary Theater Co. v. Columbia Pictures Corp.,* 120 F. (2d) 891, 894, 895 (1941); *McDaniel v. U. S.,* 108 F. (2d) 450 (1939).

[13]*Andrew Jergens v. Conner,* 125 F. (2d) 686.

[14]*C.C.C. Company v. U. S.,* 147 F. (2d) 820; *City of Baton Rouge v. Robinson,* 127 F. (2d) 693.

[15]*Corbett v. Halliwell,* 123 F. (2d) 331 (1941).

how convincing the argument that upon the evidence the findings should be different, unless there is no substantial evidence to support them."

IV. THE LOWER COURT PROPERLY ENJOINED THE APPELLANT FROM SELLING LIQUOR AT OVER THE CEILING PRICES.

Appellant assigns as one of its grounds of error the fact that the District Court enjoined the company from selling whiskey or liquors at prices in excess of those permitted by the regulation (Appellant's Opening Brief, p. 4) for the reason that no proof was offered that appellant sold any liquor at a price in excess of the maximum permissible price.

As has been shown (Point II, supra) there is no basis for such a contention inasmuch as appellant's violations constituted sales of whiskey at over the ceiling prices. Even were this not true, appellant's position would still be without merit inasmuch as violations of the evasion clause of the regulation (as shown by Point I, supra) fully warranted the Court in restraining appellant from committing other related, unlawful acts. *National Labor Relations Board v. Express Publishing Co.,* 312 U.S. 426, 436, 61 S. Ct. 693, 699; *National Labor Relations Board v. Sun Tent-Luebbert Co.,* 151 F. (2d) 483, 489; *Bowles v. May Hardwood Co., et al.,* 140 F. (2d) 914 (C.C.A. 6th); cf. *Bowles v. Luster, et al.,* C.C.A. 9th (Jan. 31, 1946).

CONCLUSION.

Appellee submits that for the reasons given above the judgment of the District Court should be affirmed. As was pointed out by this Court in the case of *Bowles v. Huff,* 146 F. (2d) 428 (an appeal taken by the Price Administrator from a judgment of Judge Roche wherein the lower Court's action in denying injunctive relief was sustained even though the defendant had stipulated to the entry of a judgment for such relief):

> "We are deprived of the advantage of seeing and hearing the witnesses in this case and we cannot weigh with unerring accuracy the value attached by the trial court to the impressions stemming from trial experience. To attempt to do so in this case would be to substitute our judgment on issues of fact, for that of the trial court."

Dated, San Francisco, California,
February 27, 1946.

Respectfully submitted,

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,

HERBERT H. BENT,
Regional Litigation Attorney,

JACOB CHAITKIN,
Special Appellate Attorney,

Attorneys for Appellee.

United States Circuit Court of Appeals for the Second Circuit
April 26, 1946

United States of America, Plaintiff-Appellee, v. George F. Fish, Inc., and Michael Simon, Defendants-Appellants.

Per Curiam--

We granted rehearing here to consider petitioners contention that the reversal in M. Kraus & Bros. v. United States, S. Ct., Mar. 25, 1946 of our earlier decision in United States v. M. Kraus & Bros., 2 Cir., 149 F.2nd 773, cited by us in the opinion herein, required reversal of this conviction. But a careful study of the four opinions rendered by the Supreme Court in that case leads us to doubt that a majority of the justices would hold the regulation here in question too limited to cover the acts charged and proved. There all the justices agreed that the Price Administrator could prohibit evasion of established price ceilings by the mere device of a tie-in sale, i.e., the requirement of a purchase of a secondary product along with the product subject to a maximum price. They divided only as to whether the regulation in question did clearly prohibit such a sale. A majority therefore held that in the absence of clear language to that effect, conviction could be had only upon proof of deficiency in value of the secondary product below its sales price and consequent break-through of the ceiling price on the main article.

Here the regulation, unlike that in the Kraus case, expressly prohibited evasion "by tying-agreement". The question is then whether this definite language supplies the gap found in the other case. Petitioners interpret the prevailing opinion there as requiring more than even these descriptive words to accomplish the outright prohibition required. Possibly this may be so, though the government draws a contrary conclusion and relies heavily upon Justice Murphy's citation of our decision here.

But, be that as it may, one of the concurring opinions, that of Justice Rutledge concurred in by Justice Frankfurter, who also concurred in Justice Murphy's opinion--appears to stress the failure of the regulation there to forbid "tie-in" sales "per se". This would seem to us to be what the present regulation does in so many words. And seemingly the three dissenting Justices would agree a fortiori. Under these circumstances of doubt that the insufficiency of the regulation is assured, we think we can appropriately maintain our view that a customer who is forced to buy melons, broccoli, or celery in order to buy lettuce is thereby required to give an additional consideration for the lettuce, and that there is therefore evasion of the stated price limitation "by tying-agreement".

Hence, having heard and considered the petition, we now reaffirm our former decision.

Judgment affirmed.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 8881 October Term, 1945, January Session, 1946.

CHESTER A. BOWLES, Administrator, Office of Price Administration for and on Behalf of the United States,

Plaintiff-Appellee,

vs.

ROYAL WINE & LIQUOR, INC., a Corporation,

Defendant-Appellant,

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

February 22, 1946.

Before SPARKS, MAJOR and KERNER, Circuit Judges.

MAJOR, Circuit Judge. The Administrator of the Office of Price Administration sought an injunction enjoining defendant from violating Maximum Price Regulation 445 (8 F. R. 11161). A temporary restraining order was entered upon the Administrator's complaint and attached affidavits. After a hearing, the lower court entered an order awarding a preliminary injunction, and from this order defendant has appealed.

Defendant, an Illinois corporation, is engaged in the wholesale liquor business at Chicago, Illinois. Defendant employs seventeen salesmen to contact its customers and has been in business since 1934. The only question involved in the court below was whether defendant had violated MPR 445 by making tie-in sales. These are sales wherein a customer is allowed to purchase a desired article only by also purchasing a certain amount of an undesired article. This practice is clearly violative of the regulation mentioned.

The District Judge found as a fact:

> "4. Defendant has since and including November 10, 1944, sold, offered to sell and delivered packaged distilled spirits at prices in excess of the maximum price therefor, as established under the provisions of Maximum Price Regulation No. 445, as amended, and has evaded the price limitations set forth in said regulation with respect to packaged distilled spirits, by means of tying agreements requiring as a condition to the purchase of such packaged distilled spirits that its customers purchase some other packaged distilled spirits, item or commodity."

Defendant contends that this finding is without substantial support, but even so that the court abused its discretion in awarding an injunction. Furthermore, it is contended that even though the injunction was proper, it is too broad in scope.

The evidence relative to this finding is in sharp conflict: Plaintiff's witnesses, customers of defendant, testified that as a condition to purchasing bonded whiskey (an article in high demand) they were required to purchase wine, rum or brandy (articles with less demand). Defendant's witnesses, its salesmen, contradicted this testimony. It is apparent that this conflict was to be resolved by the lower court. The court resolved the conflict against defendant and this resolution cannot be disturbed by us. Accepting the court's finding as we must, we think there was no abuse of discretion in the issuance of an injunction.

This brings us to the more serious question as to the scope of the injunction. Defendant vigorously urges that the injunction is too broad. Specifically, the defendant objects to the language in the injunction which restrains it from violating price ceilings not presently established but which may be established by regulations hereafter adopted by the Administrator. We set forth below the pertinent provisions of the injunction as entered. The italicized portions are the ones to which defnedant objects. Defendant was enjoined from directly or indirectly:

> "(a) Selling, delivering, soliciting the sale of, or offering for sale or delivery, or attempting or agreeing to sell packaged distilled spirits at prices in excess of the maximum prices established therefor under the provisions of Maximum Price Regulation No. 445, as now or hereafter amended, or any other Office of Price Administration regulation which may hereafter be issued establishing maximum prices for the sale of packaged distilled spirits, as said latter regulation may hereafter be amended or revised; and
>
> "(b) Evading the price limitations contained in Maximum Price Regulation No. 445, as now or hereafter amended or revised, in connection with any offer, solicitation, agreement, sale or delivery, whether or not by means of tying agreements requiring as a condition to the purchase of packaged distilled spirits that defendant's customer or customers purchase some other packaged distilled spirits, item or commodity;
>
> "(c) Otherwise violating Maximum Price Regulation No. 445, as now or hereafter amended, or violating any other regulation or order which may hereafter be issued pursuant to the Emergency Price Control Act of 1942, as amended, establishing maximum prices for packaged distilled spirits."

The propriety of the scope of this injunction depends, in our judgment, upon the interpretation which may properly be placed upon it. No question is raised but that it is directed solely at maximum prices for packaged distilled spirits as fixed by the existing regulation, an amended regulation, or a new regulation which may be promulgated by the Administrator concerning

the same subject matter. As thus interpreted, we are of the view that the injunction is not vulnerable to attack because of its scope. No good purpose could be served in citing or discussing the numerous cases which have dealt with a similar situation. Our conclusion finds support in Bowles, Price Administrator v. Montgomery Ward & Co., Inc., 143 F. 2d 38; Bowles, Administrator v. May Hardwood Co., et al., 140 F. 2d 914; Bowles, Administrator v. William Leithold, et al. (C.C.A. 3d), decided December, 1945, not yet reported. See also United States v. Hark, 320 U. S. 531, 536. In sustaining the injunction, we are not unmindful of defendant's reliance upon National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, and New York, New Haven and Hartford Railroad Co. v. Interstate Commerce Commission, 200 U. S. 361. We think these cases are not controlling in the instant situation.

The order appealed from is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

No. 11147

TED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

COFFIN-REDDINGTON COMPANY,
Appellant,

vs.

CHESTER BOWLES, Admr., OPA.,
Appellee.

IY OF OPINION OF SUPREME COURT OF THE UNITED STATES IN M. KRAUS & BROS, INC., vs. U.S.A.

mitted by counsel for appellee as a Supple-ntal Authority)

SUPREME COURT OF THE UNITED STATES.

No. 198.—October Term, 1945.

M. Kraus & Bros., Inc., Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 25, 1946.]

Mr. Justice Murphy announced the conclusion and judgment of the Court.

The problem here is whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of 1942.[1]

The petitioner is engaged in the wholesale meat and poultry business in New York City. Poultry is a commodity subject to the provisions of Revised Maximum Price Regulation No. 269,[2] promulgated by the Price Administrator pursuant to Section 2(a) of the Emergency Price Control Act of 1942. Two informations, each containing six counts, were filed against petitioner. Each count alleged that, as an integral part of a specified sale of poultry on a day during the Thanksgiving season in November, 1943, the petitioner "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring" the retail buyer to purchase chicken feet or chicken skin at a specified price as a condition of the sale of the poultry. Petitioner's president was named as a co-defendant in the first information and the two informations were consolidated for trial purposes.

The theory of the Government is that the petitioner was guilty of an evasion of the price limitations set forth in this particular regulation if it required the purchase of chicken feet and skin as a necessary condition to obtaining the primary commodity, the poultry. This practice is commonly known as a "combination sale" or a "tying agreement." It is argued that the petitioner thereby received for the poultry the ceiling price plus the price of the secondary commodities, the chicken parts.

---

[1] 56 Stat. 23; 50 U. S. C. App. § 901 *et seq.*

[2] 7 Fed. Reg. 10708; reissued with amendments, 8 Fed. Reg. 13813.

The evidence was undisputed that the poultry was billed by petitioner at ceiling prices fixed by the Price Administrator and that no ceiling prices had been set for chicken feet or chicken skin. It was also undisputed that the demand for poultry during the Thanksgiving season far exceeded the supply and that petitioner voluntarily imposed a rationing system among its customers.

The Government's case rested primarily upon the testimony of seven retail butchers who had purchased poultry and poultry parts from petitioner during the period in question. Only one of them testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he did not want and for which there was no consumer demand. His testimony, however, was disbelieved by the jury since it acquitted the petitioner on the two counts involving sales to him. With two exceptions, the other butchers testified either that the feet and skins were loaded on their trucks without previous order or solicitation along with the poultry or that they were billed for both the poultry and the parts without comment. Five of them stated that they sold a small amount of the chicken parts and gave away the balance; one remarked that he could not sell any parts and was forced to dump them. There was no explicit evidence that any of the butchers protested, sought to return the chicken parts or asked to buy the poultry separately. It was reasonable, however, for the jury to find that the sale of poultry was conditioned upon the simultaneous sale of the chicken parts and no contrary claim is made before us.

Several times the petitioner tried to introduce testimony establishing that there was a demand for chicken parts and that they were of value. Petitioner's counsel stated that "The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." But the trial judge ruled that the Government had not put that matter in issue and that the "only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores." He accordingly refused to admit the proferred testimony from petitioner's witnesses, stating to petitioner's counsel that "I direct you not to put them on the stand."

On cross examination, however, petitioner's president was questioned as to the resale value of chicken skins from the retailer to

the general public. He stated that the value was from 25 to 30 cents a pound and that the skin was used to make chicken fat. He also testified that chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin. He further stated that the demand for chicken feet came from retail butchers such as had been on the stand. Petitioner's counsel then recalled one of the retail butchers whose testimony previously had been excluded by the court. He testified that he had bought chicken feet from the petitioner, had "created a demand" for them in his store, and had sold them for from 15 to 20 cents a pound. No further witnesses were called in regard to the retail value of chicken feet and skins.

In submitting the case to the jury, the judge stated that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers. In order to violate the law these defendants must have made more than the fixed price of 37½ cents on the chickens, or the turkey price of 40 to 45 cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold." He also told the jury that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [poultry]."

The jury acquitted petitioner's president but convicted the petitioner on nine counts. Petitioner was fined $2,500 on each count, a total of $22,500. The conviction was affirmed by the court below, one judge dissenting because of the exclusion of petitioner's proffered testimony. 149 F. 2d 773. In our opinion, however, the conviction must be set aside.

Section 205(b) of the Emergency Price Control Act of 1942 imposes criminal sanctions on "Any person who willfully violates any provision of section 4 of this Act." Section 4(a) of

the Act in turn provides that "It shall be unlawful . . . for any person to sell or deliver any commodity, . . . in violation of any regulation or order under section 2 . . ." Section 2(a) authorizes the Price Administrator under prescribed conditions to establish by regulation or order such maximum prices "as in his judgment will be generally fair and equitable and effectuate the purposes of this Act." Section 2(g) further states that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Price Administrator, pursuant to Section 2(a), issued Revised Maximum Price Regulation No. 269 on December 18, 1942,[3] which regulation was in effect at the time the poultry sales in question were made. Section 1429.5 of this regulation, referred to in the informations, stems from Section 2(g) of the Act. It is entitled "Evasion" and reads as follows: "Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequences enumerated in Section 1. *Yakus* v. *United States,* 321 U. S. 414, 423. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of Sections 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices.[4] Cf. *United States* v. *Eaton,* 144 U. S.

[3] Reissued with amendments on October 8, 1943. See note 2.

[4] Section 205(b) is somewhat inartistically drawn. It does not specifically impose criminal liability on those who violate the regulations and orders of the Administrator. But the hurdle of United States *v.* Eaton, 144 U. S. 677, is cleared by the reference in Section 205(b) to Section 4, which makes it

677. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Section 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.

This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States* v. *Wiltberger,* 5 Wheat. 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by con-

---

unlawful, among other things, to sell or deliver any commodity in violation of any regulation or order. See In re Kollock, 165 U. S. 526; United States *v.* Grimaud, 220 U. S. 506; United States *v.* George, 228 U. S. 14; Singer *v.* United States, 323 U. S. 338. Congress has subsequently emphasized this reference even more clearly when, in adding Section 204(e)(1) to the Emergency Price Control Act, it spoke of a criminal proceeding "brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2." Section 107(b), Stabilization Extension Act of 1944, 58 Stat. 639. See also Section 6, Act of June 30, 1945, Public Law 108, amending Section 204(e)(1) of the Emergency Price Control Act.

temporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States* v. *Resnick,* 299 U. S. 207.

In light of these principles we are unable to sustain this conviction of the petitioner based upon Section 1429.5 of Revised Maximum Price Regulation No. 269. For purposes of this case we must assume that the Administrator legally could include tying agreements and combination sales involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices. Any problem as to his power so to provide would have to be raised initially in a proceeding before the Emergency Court of Appeals. *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414, 427-431; *Bowles* v. *Seminole Rock Co.,* 325 U. S. 410, 418-419; *Case* v. *Bowles,* — U. S. — (slip opinion, p. 3). The only issue bearing upon the regulation which is open in this criminal proceeding is whether the Administrator did in fact clearly and unmistakably prohibit tying agreements of this nature by virtue of the language he used in Section 1429.5. That issue we answer in the negative.[5]

Section 1429.5, so far as here pertinent, provides that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise." No specific mention is made of tying agreements or combination sales.

It is urged by the Government that this language fits the type of tying agreement allegedly used by petitioner. The contention

[5] Cf. United States *v.* George F. Fish, Inc., — F. 2d — (C. C. A. 2, Feb. 8, 1946).

is that petitioner received for the primary commodity not only the ceiling price but also the price of the secondary commodities which the retailers were required to buy. Conversely, the retailers were compelled to pay not only the ceiling price but also the price of the secondary commodities in order to secure the primary commodity, the poultry. Under this theory it is immaterial whether the secondary products, the chicken parts, had any value to the retailers or whether their price was a reasonable one. Reference is made in this respect to Section 302(b) of the Act, defining price as "the consideration demanded or received in connection with the sale of a commodity." Hence it is concluded that the price limitation on the primary commodity was evaded "in conjunction with any other commodity" within the meaning of Section 1429.5. This argument, moreover, represents the consistent interpretation of the Administrator.[6]

But we do not believe that, under the strict rule of construction previously discussed, such an interpretation of Section 1429.5 is dictated by its plain language. It prohibits evasions through sales of price-regulated commodities "in conjunction with any other commodity." That clearly and undeniably prohibits evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity. But to say that the language covers more, that it also applies to a case where the secondary product has value and is sold at its ceiling or market price, is to introduce an element of

[6] The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. Thus, in an interpretation issued November 5, 1943, applicable to all maximum price regulations, the Administrator, in discussing violations and evasions, made the following interpretation as to tying agreements:

"(a) *As to freeze regulations*: A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.

"(b) *As to regulations other than base period freeze regulations*: OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation.

"*For example*, it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond."

O. P. A. Service (Pike & Fischer) vol. I, p. 2:812.

conjecture and to give effect to an unstated judgment of policy.

The language of Section 1429.5 is appropriate to and consistent with a desire on the Administrator's part to prohibit only those tying agreements involving tied-in commodities that are worthless or that are sold at artificial prices. The Administrator may have thought that other tied-in sales did not constitute a sufficient threat to the price economy of the nation to warrant their outlawry, or that they were such an established trade custom that they should be recognized. But we are told that he had no such thought, that prohibition of all tying agreements is essential to prevent profiteering, and that this blanket prohibition is the only policy consistent with the purposes of the Act. All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must look solely to the language actually used in Section 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect self-evident from the language used.

The Administrator's failure to express adequately his intentions in Section 1429.5 is emphasized by the complete and unmistakable language he has used in other price regulations to prohibit all tying agreements, including those involving the sale of valuable secondary products. Thus he has inserted in the meat regulation a provision prohibiting evasion of price limitations by "offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity." Section 1364.406, Revised Maximum Price Regulation No. 169, as amended March 30, 1943, 8 Fed. Reg. 4099. And in the clothing regulation, the Administrator has provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." Section 15, Revised Maximum Price Regulation No. 287, issued June 29, 1943, 8 Fed. Reg. 9126. See also Section 1389.555, Maximum Price Regulation No. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The very definiteness with which tying agreements of all types were prohibited in regard to many other commodities and the absence of any such prohibition in Section 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were

permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion. And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language.

In view of these considerations we interpret Section 1429.5 as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand. While the informations can be interpreted as charging a crime under Section 1429.5 as we have read it, the trial judge's charge to the jury was clearly erroneous. There was evidence, at first excluded but later admitted, that the chicken parts which the petitioner sold did have value and were sold at their market price. If the jury believed such evidence it was entitled to acquit the petitioner. But the trial judge charged that the "one" question in the case was whether the sale of the chicken parts was a necessary condition to the purchase of the poultry. On the basis of that charge the jury may well have disregarded as irrelevant the evidence of value as to the secondary products and convicted solely on the ground that there was a tie-in sale. Such a charge is thus reversible error.

There were additional statements in the charge to the jury, to be sure, that the petitioner was charged with having compelled, in connection with the purchase of poultry, the simultaneous purchase of chicken parts "that were utterly useless and valueless to the purchasers" and at prices "entirely out of line with any value that attaches to them." While such statements tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States,* — U. S. —, (slip opinion, p. 5).

The case must therefore be remanded for a new trial, allowing full opportunity for the introduction of evidence as to the value of the chicken parts and charging the jury in accordance with the proper interpretation of Section 1429.5.

It is so ordered.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice Douglas, concurring.

If a retailer sold meat or any other commodity to a consumer only on condition that he purchase and pay for a wholly worthless article, it would be clear that price ceilings had been violated. For the attribution of value to the worthless article would be nothing more than an evasive method of increasing the ceiling price on the other commodity. I can see no difference where the additional commodity, although it has value, has no value to the purchaser.

But this case is different in both respects or so the jury might find. First, chicken gizzards, chicken skin, or chicken feet are not wholly worthless articles. There is demand for them and they have a value. Second, they were tied-in with sales to retailers who constitute the market for chicken gizzards, chicken skin, and chicken feet. If in fact they had no value on that market, evasion of price ceilings would be established. But since they apparently had some value on the retail market, no violation of price ceilings occurred unless the price charged for them in fact exceeded that market value. That might be shown either by proof of the fact that the market value was lower or by showing that the quantity forced on the retailers was in excess of the quantity which the market could absorb.

The case should be remanded for a new trial on that basis. For the trial court ruled that the additional articles sold were valueless and that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other." That ruling took from the jury the basic issue in the case.

I think there was evidence that these chicken gizzards, chicken skin, and chicken feet were valueless to some of the retailers and that a conviction would be warranted. But it is not enough that we conclude on the whole record that a defendant is guilty. *Bollenbach* v. *United States,* 326 U. S. ——. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt.

Mr. Justice Rutledge, concurring.

I am in agreement with the result and substantially so with Mr. Justice Murphy's opinion. I do not think that administra-

tive regulations, given by statute the function of defining the substance of criminal conduct, should have broader or more inclusive construction than statutes performing the same function. If the regulations involved here had been enacted specifically by Congress in statutory form, I do not think they could properly be construed to forbid tie-in sales of these commodities *per se.*

As the opinion points out, the regulations, with reference to other commodities, expressly prohibited tie-in sales, regardless of whether the tied-in commodity had value. Persons dealing in those commodities were specifically informed by the regulations, therefore, that such sales would be in violation of the Act. There was no such specific prohibition applicable at the time of the sales in question to sales of poultry. However the general prohibition against evasion contained in § 1429.5 of Revised Maximum Price Regulation No. 269 might be interpreted, if there had been no regulations specifically forbidding tie-in sales of other commodities, in view of their existence and the absence of any similar provision relating to poultry, I do not think it permissible to construe § 1429.5 as covering the same ground. Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content.

Accordingly I agree with the conclusion that tie-in sales were not forbidden at the time of these sales, as to poultry. I also agree that the trial court, both in its instructions and in some of its rulings upon the admissibility of evidence, went on a conception of the law inconsistent with this view. I therefore concur in the Court's disposition of the cause.

Mr. Justice FRANKFURTER, although agreeing with the opinion of Mr. Justice MURPHY, also joins in this opinion.

Mr. Justice Black, dissenting.

We were at war in 1943. Scarcity of food had become an acute problem throughout the nation. To keep the public from being gouged the government had set ceiling prices on food items. Congress had made it a crime to sell food above these ceiling prices. When Thanksgiving Day approached there were not enough turkeys to supply the demand of the many American families who wanted to celebrate in the customary style.

The information filed in the district court charged that the petitioner "unlawfully, wilfully and knowingly evaded the provisions of . . . " Revised Maximum Price Regulation No. 269, § 1429.5, by compelling and requiring the buyer to purchase chicken feet, chicken skin, or gizzards at a specified price, as a condition of the sale of poultry to them. During peace times the petitioner had ordinarily done a gross business of seven-and-a-half million dollars a year. In 1943, presumably due to the meat shortage incident to the war, the petitioner's gross business was not quite four million dollars. This meat shortage was felt acutely during the Thanksgiving season, when petitioner instead of his usual 100 to 150 cars of turkeys received only one car. When the retail butchers and poultry market proprietors came clamoring for their share of the small supply (which the defendant rationed among them) they found that along with the turkeys which they wanted so badly petitioner gave and charged them for large amounts of chicken feet, skins and gizzards which they had not asked for at all and which for the most part they had never before sold as separate items. While the butchers paid in addition to the ceiling price charged for the turkeys the price charged for the chicken skins and feet, they did so only because they understood that unless they bought these unwanted items they could get no turkeys. Only one of the butchers sold all the chicken skins to his customers. He explained that he operated his store in a poor neighborhood where the food shortage had become so acute that people were willing to buy anything they could get. As to the rest of the butchers, some simply dumped the chicken skins and feet while others, after diligent efforts, sold a few pounds and then gave the rest away either to their customers, or to charitable institutions. Certainly these particular butchers forced to buy these unwanted items for the first time were not the regular retail outlet for disjointed chicken feet and peeled chicken skins, if

there ever was such an outlet on a voluntary basis. It is clear therefore that as a result of petitioner's forcing his customers to buy the feet and skins along with the turkeys, the retailers' cost price of the turkeys was in effect increased beyond the ceiling.

In my opinion petitioner's practice in forcing the butchers to buy unwanted chicken feet in order to get wanted turkeys amounted to a direct violation of the Price Control Act. It certainly was no less a violation of the Administrator's regulation against evasion. In promulgating this regulation the Administrator could not possibly foresee every ingenious scheme or artifice the business mind might contrive to shroud violations of the Price Control Act. The regulation does not specifically describe all manner of evasive device. The term "tying agreement" nowhere appears in it and a discussion of such agreements is irrelevant. We need not decide whether what petitioner did would have violated every possible hypothetical regulation the Administrator might have promulgated. The regulation here involved prohibits every evasion of the Price Control Act. It thus condemns all actions that are "on the wrong side of the line indicated by the policy if not the mere letter of the law." *Buller* v. *Wisconsin*, 240 U. S. 625, 631. What petitioner did here is on the wrong side of both letter and policy. The Court does not deny that there was ample evidence to support the jury's finding that petitioner did what the information charged it with doing. In my opinion that was a crime.

Had butchers been required to buy bags of stones as a condition to buying turkeys, I think it would have been hard to persuade them, or anybody else, that the seller who forced them to do so was not guilty of violating and evading the law. Had people who wanted and needed bacon, at the time when bacon was almost impossible to purchase, been required to buy hog hoofs and hog skins with each purchase of a pound of bacon, I think the sellers would have violated the law. If the wholesaler can require the retailer to purchase unwanted items the retailer can force the ordinary consumer to do the same thing. A restaurant could then force its customers to purchase used kitchen fats along with their meals. It would be little consolation to a customer forced to do so to learn that soap factories can use these fats and would be willing to purchase them. He would pay the price, and either dump the fat into the nearest ashcan or tell the waiter to take

the smelly substance away. The result would be increased cost of meals in that restaurant. Thinly disguised subterfuges like the one here adopted should not be sanctioned by courts. Once they are sanctioned, laws enacted by Congress for the public welfare are no longer respected.

When food is scarce and people are hungry it is a violation, both of the letter and spirit of the Price Control laws, to require consumers or retail stores where they make their purchases, to buy things that they neither need nor want as a condition to obtaining articles which they must have. I dissent from the Court's disposition of this case.

Mr. Justice Reed and Mr. Justice Burton join in this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 158—October Term, 1945.

(Argued January 7, 1946 Decided February 8, 1946.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

GEORGE F. FISH, INC., and MICHAEL SIMON,

Defendants-Appellants.

Before:

L. HAND, CLARK and FRANK,

Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

George F. Fish, Inc., and Michael Simon were convicted of violating maximum price regulations established under the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, §901 *et seq.*, and they appeal. Affirmed.

LEWIS F. GLASER, of New York City (Edgar F. Sachs, of New York City, on the brief), *for defendants-appellants.*

JOHN C. HILLY, Asst. U. S. Atty., of New York City (John F. X. McGohey, U. S. Atty., of New York City, on the brief), *for plaintiff-appellee.*

CLARK, *Circuit Judge*:

An information filed in the District Court charged the defendants George F. Fish, Inc., a wholesale dealer in fruits and vegetables, and Michael Simon, its salesman, with "unlawfully, wilfully and knowingly" evading the provisions of Revised Maximum Price Regulation No. 426, issued under the authority of §2, Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, §902. After a jury verdict of guilt, the court entered judgment of a fine against the corporate defendant, and imprisonment against the individual defendant. 50 U. S. C. A. Appendix, §§904, 925(b). Defendants appeal from the conviction, urging the invalidity of the regulation, the failure of the information to allege a crime, the insufficiency of the evidence to support the verdict, and the nonliability of the corporate defendant to criminal prosecution for the acts charged.

While the regulation does not appear doubtful or unclear to us, *United States* v. *M. Kraus & Bros.*, 2 Cir., 149 F. 2d 773, 774, certiorari granted *M. Kraus & Bros.* v. *United States,* 66 S. Ct. 740, it seems that we are without jurisdiction to consider the objection of unconstitutionality for vagueness and ambiguity. In an effort to obtain uniformity in the application of the Act, Congress established a procedure by which a person affected may first protest to the Emergency Price Administrator and thereafter test the validity of any regulation, order, or price schedule by filing suit in the specially constituted Emergency Court of Appeals, with final review accorded upon petition of certiorari to the Supreme Court. 50 U. S. C. A. Appendix, §§923(a), 924(a), 924(d). In *Yakus* v. *United States,* 321 U. S. 414, the Supreme Court conclusively determined that the invalidity of a regulation on grounds of arbitrary and capricious operation may not be raised as a defense in a criminal proceeding. Though the Court left open the present

question of unconstitutionality disclosed upon the face of the regulation, Congress thereafter amended the Act so as to provide an additional remedy in criminal cases.[1] As the Act now stands, an accused in a criminal proceeding may make timely application to the court for leave to file a complaint in the Emergency Court of Appeals challenging the validity of the regulation. 50 U. S. C. A. Appendix, §924(e), added June 30, 1944, and amended June 30, 1945. The court in which the proceeding is pending must grant leave if it finds that the defendant is acting in good faith and there is "reasonable and substantial excuse" for his failure to take advantage of the protest proceeding provided by the original act. Congress adopted this amendment with the express purpose of eliminating any question of due process in the situation now presented; and we think it has succeeded in doing so. The defendants here, having neither employed the protest proceeding nor applied for a determination of the issue by the Emergency Court of Appeals, cannot now raise the invalidity of the regulation. *Old Monastery Co.* v. *United States,* 4 Cir., 147 F. 2d 905, affirming *United States* v. *Renken,* D. C. W. D. S. C., 55 F. Supp. 1; *Taylor* v. *United States,* 9 Cir., 142 F. 2d 808, certiorari denied 323 U. S. 723.

The regulation here particularly involved is the "evasion" section of Maximum Price Regulation 426, which prohibits evasion of the stated price limitations, "whether by direct or indirect methods, in connection with any offer,

---

1 See the remarks of Senator Danaher, 90 Cong. Rec. 5305, where he quotes the sentence reserving this issue in the *Yakus* case and then says: "But in what we have done we have perfected the two points as to which the Supreme Court had entered no decision, to the end that there can be no question of the denial of or the existence of due process. Thus we afford a remedy which is a complete answer in both these respects, because we give the citizen time within which he can file the protest." See also the remarks of Senator Wagner, 90 Cong. Rec. 5289, and, more generally, 90 Cong. Rec. 5300-5306, 5365-5375.

solicitation, agreement, sale, delivery, purchase or receipt of or relating to fresh fruits or vegetables alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or discount, premium or other privilege, or by tying-agreement or other trade understanding or otherwise." [2] The information charged that the defendants on three specified dates evaded the maximum price regulation by compelling J. M. Fierro and William Zwerdling to purchase unrationed and undesired commodities as a condition to the purchase of a rationed item. Defendants insist that the information failed to allege a crime, since the nominal charge for the lettuce was the maximum price and the unrationed items were sold at ceiling. That such a sale nevertheless constitutes a tying-agreement under the regulation was determined by this court in *United States* v. *M. Kraus & Bros., supra;* and this has been the uniform view of the district courts. *United States* v. *Armour & Co. of Delaware,* D. C. Mass., 50 F. Supp. 347; *Brown* v. *Banana Distributors of Connecticut,* D. C. Conn., 52 F. Supp. 804; *Bowles* v. *Cudahy Packing Co.,* D. C. W. D. Pa., 58 F. Supp. 748. We can see no reason to depart from our earlier decision. A rationed item cannot be said to be actually sold at ceiling when, although the price quoted on it is the maximum legal price, there is at the same time an enforced sale of an unrationed commodity. It seems obvious to us, as it certainly would to the consuming public, that when a customer who desires to obtain lettuce must buy honeydew melons, broccoli, or celery in order to get it, he gives a consideration above and beyond that fixed by the maximum price regulation.

A mere reading of the information indicates the absence of merit in defendants' further contention that it was not

2 Sec. 11 of Art. I of Sec. 1439.3 of Maximum Price Regulation 426.

sufficiently detailed. They were informed of the factual basis of the claim, so that they could adequately prepare a defense; and any judgment in the present suit would constitute a bar to double jeopardy in another. *United States* v. *Fried,* 2 Cir., 149 F. 2d 1011; *United States* v. *Achtner,* 2 Cir., 144 F. 2d 49.

Defendants next contend that the evidence failed to prove the government's case beyond a reasonable doubt. Questions of credibility were of course for the jury; and, as we have had occasion to point out so often lately, our task is not to discover evidence convincing beyond a reasonable doubt, but rather to ascertain whether there was basis for the jury's conclusion. *United States* v. *Kushner,* 2 Cir., 135 F. 2d 668, certiorari denied *Kushner* v. *United States,* 320 U. S. 212; *United States* v. *Greenstein,* 2 Cir., Jan. 28, 1946, citing many of our recent cases. The information was in three counts, each charging both of the defendants with the sale to Fierro on November 17, 1943, of 10 boxes of honeydew melons as a condition of the sale of 4 crates of lettuce; to Fierro on November 19, 1943, of 5 boxes of broccoli as a condition of the sale of 5 crates of lettuce; and to Zwerdling on November 27, 1943, of 5 crates of celery as a condition of the sale of 5 crates of lettuce. Concerning the first sale, Fierro testified that Simon told him, "If you want any melons I will try to squeeze you out a few [lettuce]." "Take melons, I will give you lettuce. If you don't take no melons, I haven't got no lettuce." The evidence as to the other two sales was substantially the same; and the bills of sale introduced by the government indicated that simultaneous sales were made. To refute this evidence, defendants point to possible selfish motives which might have let Fierro and Zwerdling to testify as they did; to what they assert to be the circumstantial improbability of the sale of honeydew melons and lettuce at

the same time, since they were ordinarily sold from different places; to the failure of Fierro and Zwerdling to complain to the management of the corporation. But these attacks on the prosecution witnesses were for the jury; in the light of their direct testimony, the verdict clearly must stand against this appeal. Much is made of some hesitancy in their testimony. The jury presumably considered this natural in view of their obvious unwillingness to testify and their fear of losing future credit with wholesalers.

The corporate defendant makes a separate contention that the guilt of its salesman is not to be attributed to it. But the Supreme Court has long ago determined that the corporation may be held criminally liable for the acts of an agent within the scope of his employment, *New York Cent. & H. R. R. Co.* v. *United States,* 212 U. S. 481; and the state and lower federal courts have been consistent in their application of that doctrine. *Zito* v. *United States,* 7 Cir., 64 F. 2d 772; *C. I. T. Corp.* v. *United States,* 9 Cir., 150 F. 2d 85; *Mininsohn* v. *United States,* 3 Cir., 101 F. 2d 477; *Egan* v. *United States,* 8 Cir., 137 F. 2d 369, certiorari denied 320 U. S. 788; *United States* v. *Arrow Packing Corp.,* 2 Cir., Jan. 29, 1946. See also *Director of Public Prosecutions* v. *Kent and Sussex Contractors, Ltd.,* [1944] 1 K. B. 146; *Moore* v. *I. Bresler, Ltd.,* [1944] 2 All. E. R. 515, discussed in 19 Aust. L. J. 51; *Chuter* v. *Freeth & Pocock, Ltd.,* [1911] 2 K. B. 832; the articles, *Corporations and the Criminal Law,* 11 Sol. 101; *Criminal Liability of Corporations,* 88 Sol. J. 97, 139; and the full discussion of corporate responsibility under the penalty provisions of the Act, *Regan* v. *Kroger Grocery & Baking Co.,* 386 Ill. 274, 54 N. E. 2d 210, 219.

No distinctions are made in these cases between officers and agents, or between persons holding positions involving

varying degrees of responsibility. And this seems the only practical conclusion in any case, but particularly here, where the sales proscribed by the Act will almost invariably be performed by subordinate salesmen, rather than by corporate chiefs, and where the corporate hierarchy does not contemplate separate layers of official dignity, each with separate degrees of responsibility. The purpose of the Act is a deterrent one; and to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion. Here Simon acted knowingly and deliberately and hence "wilfully" within the meaning of the Act, *Zimberg* v. *United States,* 1 Cir., 142 F. 2d 132, 137, 138, certiorari denied 323 U. S. 712, and his wilful act is also that of the corporation. *United States* v. *Union Supply Co.,* 215 U. S. 50, 55; *United States* v. *Illinois Cent. R. Co.,* 303 U. S. 239.

Judgment affirmed.

RECORD PRESS—63 Park Row—New York 7, N. Y.—REctor 2-2638
2-11-46—125 USCA—1564